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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL LEWIS OVERTON,

Defendant and Appellant.

A145926

(Alameda County  
Super. Ct. No. C73300)

Appellant Michael Lewis Overton appeals the decision of the Superior Court of Alameda County denying his request for conditional release for outpatient treatment pursuant to Penal Code section 1026.2.<sup>1</sup> Such postjudgment orders, which affect the substantial rights of a party, are appealable. (§ 1237, subd. (b); *People v. Cross* (2005) 127 Cal.App.4th 63, 66.)

Appellant's court-appointed counsel has filed a brief informing the court that he has found no arguable issues to be pursued on appeal. Appellant's counsel acknowledges that *Conservatorship of Ben C.* (2007) 40 Cal.4th 529 (*Ben C.*) held that *Anders/Wende*<sup>2</sup> procedures are not required in appeals from conservatorship proceedings by either the federal or California constitutions, because such proceedings are civil not criminal, and that the *Ben C.* rule applies to appeals, such as this one, from orders denying outpatient

<sup>1</sup> All statutory references are to the Penal Code.

<sup>2</sup> *Anders v. California* (1967) 386 U.S. 738; *People v. Wende* (1979) 25 Cal.3d 436.

status under section 1026.2. (*People v. Dobson* (2008) 161 Cal.App.4th 1422 (*Dobson*).) Like *Ben C.*, *Dobson* concluded that while an appellate court may dismiss an appeal arising under section 1026.2, the court “may, of course, find it appropriate to retain the appeal.” (*Ben C.*, at p. 544, fn. 7; *Dobson*, at p. 1439.

Appellate counsel “respectfully asks this court, at a minimum, to conduct the level of review prescribed for LPS conservatees . . . including affording appellant the opportunity to file a supplemental brief.” However, appellate counsel himself “advised appellant that he may personally file a supplemental brief within 30 days raising any issues which he wishes to call to the court’s attention,” and appellant filed no such brief. Nevertheless, we shall provide the independent review required by *People v. Wende*, *supra*, 25 Cal.App.3d 436.

After reviewing the entire record and concluding that there are no issues in need of additional briefing, we shall affirm the ruling of the trial court.

### **BACKGROUND**

Appellant was convicted of second degree murder in 1981. The record contains no information describing the homicide except a “California Department of State Hospitals – Treatment Plan” which states in passing that appellant “shot his wife.” On March 26, 2015 (all dates are in that year), after he had been in prison for about 33 years, appellant was transferred to Atascadero State Hospital pursuant to section 2684.

On April 20, less than a month after he entered Atascadero, appellant, acting in propria persona, filed a petition for conditional release for outpatient treatment in the community pursuant to section 1026.2. About five weeks later, on May 29, the trial court summarily denied the petition for conditional release as follows: “The court, having reviewed the petition, filed on April 29, 2015, for transfer to outpatient treatment, hereby denies the petition.”<sup>3</sup>

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<sup>3</sup> The minute order states that the petition was denied on April 20, but the “Order of the Court” dated May 29, indicates it was not mailed to appellant until June 2.

On July 8, appellant filed a timely notice of appeal from the written order denying his petition.<sup>4</sup>

## DISCUSSION

Appellant's "Petition for Transfer to Outpatient Treatment," which was filed in the Alameda County Superior Court on April 20, states at the beginning that "Petitioner is entitled under Section 1026.2, subdivision (a) to apply to this court for his release upon the ground that his sanity has been restored. Upon the receipt of such an application from a person confined in a state hospital, the court is required to hold a hearing to determine if the applicant would no longer be a danger to the health and safety of others if under supervision and treatment in the community. (*Id.*, subd. (e).) Upon making such determination the court has the authority to order the applicant placed in an appropriate outpatient treatment program in the community. (*Ibid.*)"

Appellant was transferred to Atascadero State Hospital pursuant to section 2684. That statute "provides for the transfer of a mentally ill prisoner to a state hospital . . . if it is determined that such transfer would expedite the prisoner's rehabilitation." (*People v. Watson* (2007) 42 Cal.4th 822, 824.) "Unlike a person committed to state hospital as a mentally disordered offender or sexually violent predator, a prisoner who is transferred pursuant to section 2864 still is serving a sentence of a term of years in state prison and is confined pursuant to a judgment committing him or her to confinement in the state prison." (*Id.* at p. 829.) Sections 2684 and 2685 "contemplate that a prisoner's transfer to a state hospital is temporary, and that upon completion of a successful treatment program, the prisoner will be returned to state prison for completion of the term of

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<sup>4</sup> In recognition of the problem that arises when, as here, a judgment has not been orally pronounced in the defendant's presence, the Supreme Court has held that "the period for filing a notice of appeal does not begin to run against a prisoner, whose only contact with the courts is through the mail, until the prisoner receives the order from which he seeks to appeal. (*People v. Griggs* (1967) 67 Cal.2d 314, 318.) Appellant filed his notice of appeal within 60 days of receiving the written notice provided by the trial court and the filing was therefore timely.

confinement prescribed by his or her sentence, with time spent in the hospital credited toward completion of the term imposed by the sentence.” (*Id.* at pp. 829-830.)

The procedure applicable to prisoners transferred to state hospital pursuant to section 2684 is not that prescribed by section 1026.2, but the procedure described in section 2685. As pertinent, the latter statute provides that when in the opinion of the superintendent of the state hospital to which the prisoner was transferred under section 2684, the prisoner “has been treated to such an extent that such person will not benefit by further care and treatment in the state hospital, the superintendent shall notify the Director of Corrections of that fact. The Director of Corrections shall immediately send for, take and receive the prisoner back into prison. The time passed at the state hospital shall count as part of the prisoner’s sentence.”

Appellant, who entered Atascadero less than a month before he filed the instant petition, submitted no evidence showing he would not benefit from further care in that facility;<sup>5</sup> nor is he even asking to be returned to state prison.

While the denial of conditional release on outpatient status is the denial of a “substantial right” within the meaning of section 1237, subdivision (b) (*People v. Cross*, *supra*, 127 Cal.App.4th at p. 66) and therefore appealable, appellant was not denied any right available to him under sections 1026 or 1026.2. The only right appellant arguably possesses, though he is not asserting it, arises under section 2685; but no court has ever declared that the right to leave the state hospital and return to prison pursuant to that statute constitutes a substantial right under section 1237, subdivision (b), nor does any other statute authorize an appeal from the failure or refusal of the superintendent of a

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<sup>5</sup> Appellant attached to his notice of appeal a five-page document entitled “California Department of State Hospitals – Treatment Plan.” This document—which analyzes the reasons appellant was admitted to Atascadero and his current status, and proposes a treatment plan—was “finalized” on June 25, two months after the challenged ruling of the superior court. Furthermore, nothing in this document indicates appellant would not benefit from further treatment in the state hospital.

state hospital to notify the Director of Corrections that a prisoner would not benefit from further hospitalization and should therefore be returned to prison.

The application to superior court authorized by section 1026.2 does *not* apply to a person such as appellant, who was transferred to a state hospital under section 2684; it applies to persons committed to the State Department of State Hospitals after pleading not guilty by reason of insanity found by the trier of fact to be insane at the time his or her offense was committed. Such a person may be placed on “outpatient status.”

(§ 1026, subds. (a) & (b).)

Appellant, who has never claimed to be insane, is manifestly not such a person.

The record discloses no other arguable issue warranting further briefing.

Accordingly, the order denying appellant the right to be conditionally released from state hospital on outpatient status is affirmed.

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Kline, P.J.

We concur:

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Stewart, J.

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Miller, J.

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